

A PRIMER ON THE TYPES OF LAND IN FEDERAL INDIAN RESERVATIONS FOR GROUNDWATER SUSTAINABILITY AGENCIES

Background. In California title to all land was transferred from Mexico to the United States by the Treaty of Guadalupe Hidalgo in 1848. The United States immediately enacted a statute setting up a land claims commission to which those who claimed land under Mexican law could present their claims within a 2-year period to the commission and, if found to be proper, the United States would confirm the claim and issue a federal patent. The holders of Spanish and Mexican land grants and pueblos all did so, and their grants were all confirmed. However, no tribe did so because no one ever told them the commission even existed. Therefore, the time period passed and no Indian title was confirmed, even though recognized by Mexican law. In 1903 the U.S. Supreme Court held that this did not matter. Similarly, the United States negotiated 18 treaties with the tribes of California in 1851-1852. In these treaties, the tribes yielded their claims to 7/8 of the land of California to the United States, in return for specified reservations totaling about 1/8 of California. However, the U.S. Senate not only never ratified any of the 18 treaties, it concealed their existence until 1905. Therefore, between the unknown land title commission and the unratified treaties, California tribes were left entirely without any enforceable rights to any land by 1852. Their descendants were later compensated for this loss of most of California's land in 1968 at the munificent rate of 48¢ per acre.

The public domain. Aside from the confirmed Mexican and Spanish grants, all land in California thus belonged to the United States by 1852. Such federal land, not designated for any other use, was and is the public domain. Some of this original vast public domain remains today, and is administered by the Bureau of Land Management. But over the years, much of the public domain in California has been designated, by Congress or the President, for other specified uses such as: Indian reservations, military reservations, national parks, national forests, national monuments, seashores, etc., all of which are public use serving a public purpose. In each of these other kinds of designations, the United States continues to hold fee simple title to the land in its own name, but subject to the designation. However, title is different for federal Indian reservations.

Federal Indian reservations. For only federal Indian reservations, the fee title is not simply in "United States". Instead, title is held as "United States in trust for X Indian tribe". The United States owns the fee, as with other federal reservations and uses, but holds it in trust for a specified tribe. Starting mostly in the 1870's, the President and Congress made attempts to provide some tiny land base for California's otherwise landless tribes by designating specified parcels of public domain land as federal Indian reservations, with title held this way. For many reservations (including rancherias), this is how the title is held today: the United States holds the fee title, but in trust for a specified tribe. This is what is called "trust land", land that the United States holds in trust for a tribe. Such trust land cannot be condemned, sold, leased, conveyed, taxed, regulated, or otherwise dealt with by others unless by specific authorization by Congress. There is a process (often called "fee-to-trust") by which a tribe can now take a

piece of fee land and have the United States accept it into trust as new or additional trust land for that tribe, but the process is onerous and difficult, and does not always succeed.

Trust Allotments. Many reservations now remain as they were established: blocks of land held in trust for the tribe by the United States. However, starting in 1887 many reservations went through a process called “allotment” by which individual parcels of tribal trust land were subdivided into parcels as small as 5 acres, and allocated to individual Indians. These parcels are known as “allotments” by which the title to the individual parcel stayed in trust, but for the individual Indian, not the tribe. Such allotted trust land is different from unallotted tribal trust land. Allotted trust land can be sold so that the buyer receives fee title. It can be condemned. It can be more easily leased. The Indian owner (called the “allottee”) can also take it out of trust and receive a fee patent. Then such land passes out of trust and into fee, it is subject to state and local taxation and, in many but not all cases, is subject to state and local regulation (zoning, land use, county ordinances regarding wells, etc.). Reservations that have been allotted typically are a patchwork of (1) unallotted tribal trust land, (2) allotted trust land, and (3) fee land. However, the boundaries of the reservation are not affected by allotment or issuance of a fee patent. Each reservation is different. Outsiders will simply have to inquire to see if a particular reservation was ever allotted and, if so, what the status of individual parcels on it are. In addition, a very few allotments to individual Indians were made from lands of the public domain, known as “public domain allotments”. Some have passed into fee, but a few remain in trust.

Tribal governments. Indian tribes are not just voluntary social organizations of people of Indian descent, like the Knights of Columbus. Federally-recognized tribes (there are over 500 in the official list) are governments that exercise normal sovereign powers of self-government on the reservation over their people and over at least all trust land on the reservation and, sometimes, over fee land on the reservation. This includes misdemeanor criminal jurisdiction and the kinds of local powers commonly exercised by counties, such as zoning and land use, environmental controls, and control over wells and groundwater. Many tribes, especially those in remote areas, have been exercising effective sustainable groundwater management on their reservations for decades. Under federal law, state law and county ordinances do not apply to tribes and cannot be enforced against tribes, except where Congress has specifically said so. Although tribes are owners of trust land, they are also the local governments over the reservations. The federal government, and state and local governments, must relate to tribal governments on a government-to-government basis, as well as landowners.

How tribes fit into the Sustainable Groundwater Management Act. Although SGMA does not allow a tribe to be a GSA, it does allow tribes to participate in GSA’s by MOU’s and similar arrangements. Such participation is optional on the part of a tribe. Some tribes will opt not to participate at all, while others will participate actively. A GSA cannot require a tribe whose reservation is in one of the Bulletin 118 groundwater basins to do anything at all. A GSA will be better served to cultivate a voluntary and mutually beneficial working relationship with such a tribe on a government-to-government basis. Sustainably managed groundwater basins benefit everyone.